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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-882

HUGO FREDERIC FORSTER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

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No.

HUGO FREDERIC FORSTER,
Petitioner,

VS.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

Petitioner, Hugo Frederic Forster, hereby petitions this Court for a writ of certiorari to review the decisions of the Ninth Circuit in the appeal entitled *"United States of America, Plaintiff-Appellee v. Hugo Frederic Forster, Defendant-Appellant"* (No. 77-2969, filed August 16, 1978) and on petition for rehearing and suggestion for rehearing in banc (denied November 3, 1978). The decisions and orders of the Ninth Circuit Court of Appeals affirming the judgment of the United States District Court for the Northern District of California, denying a rehearing, and rejecting petitioner's suggestion for a rehearing in banc are appended hereto in accordance with Rule 23(1)(i) of the Supreme Court Rules.

I.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Ninth Circuit Court of Appeals filed its decision affirming the judgment of the United States District Court for the Northern District of California on August 16, 1978, Senior Circuit Judge Charles Merrill dissenting. Pursuant to Rule 40(a) of the Rules of Appellate Procedure, petitioner timely filed a petition for rehearing and suggestion for rehearing in banc. Said petition and suggestion were denied on November 3, 1978, with Judge Merrill recommending rehearing and rehearing in banc.

The legal effect of a timely petition for rehearing is to stay the time for petitioning for certiorari until thirty days from the date of the order denying a rehearing, Supreme Court Rule 22(2), *United States v. Healy,* 376 U.S. 75, 78, 84 S.Ct. 553, 11 L.Ed.2d 527, 531 (1964). Consequently, this petition is timely filed. Moreover the time limitation is not jurisdictional. *Taglianetti v. U.S.,* 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969).

The jurisdiction of this Court is invoked in accordance with 28 U.S.C. Sec. 1254, which provides in relevant part,

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ."

II.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether it was proper to deny petitioner's motion to suppress on facts identical to the facts of *Elkins v. United States,* 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

2. Whether the principle, established in *Elkins, supra, Silverthorne Lumber Company v. United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 647 (1920) and *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) permits use in a federal prosecution of evidence seized from a state prosecution under a federal warrant when neither the federal warrant nor a prior state warrant provides probable cause for their seizure and the prior state warrant has on that basis been adjudged unconstitutionally overbroad.

3. Whether the Fourth Amendment or principles of comity prohibit the use in a federal prosecution of evidence seized under a federal warrant from a state prosecutor who is under state court orders to return the evidence illegally seized and who requests that federal law enforcement officials obtain a warrant against him for the sole and express purpose of shielding him from contempt of court.

4. Whether, when following a joint state-federal investigation, a state arrest, state indictment, and dismissal of the state indictment on constitutional grounds, there is instituted a federal prosecution for the same criminal acts, the defendant has become "accused" for the purposes of the speedy trial requirements of the Sixth Amendment at the

time of the state arrest or indictment. This is a question as to which there is a division among the circuits.

5. Whether, when a grand jury has indicted exclusively on the basis of hearsay testimony, the indictment must be dismissed absent instructions to the Grand Jury as to the inadmissibility of hearsay. This is a question as to which there is a division among the circuits.

III.

STATUTORY AND CONSTITUTIONAL PROVISIONS WHICH THIS CASE INVOLVES.

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment of the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment of the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

18 U.S.C. Section 371 provides:

> *"Conspiracy to commit offense or to defraud United States*
>
> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. Section 2314 provides in relevant part:

"Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

. . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . ."

California Penal Code Section 182 provides in relevant part:

"Criminal conspiracy: Acts constituting: Punishment: Venue

"If two or more persons conspire:

"1. To commit any crime.

. . .

"They are punishable as follows:

. . .

"If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term. . . ."

California Penal Code Section 496 provides in relevant part:

"Receiving property obtained by theft or extortion: Penalty for concealment or withholding: Presumption from buying or receiving: Burden to show inquiry

"1. Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison, or in a county jail for not more than one year; provided, that where the district attorney or the grand jury determines that such action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed two hundred dollars ($200), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in the county jail not exceeding one year.

"2. Every person whose principal business is dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee or representative of such person, who buys or receives any property which has been stolen or obtained in any manner constituting theft or extortion, under such circumstances as should cause such person, agent, employee or representative to make reasonable inquiry to ascertain that the person from whom such property was bought or received had the legal right to sell or deliver it, without making such reasonable inquiry, shall be presumed to have bought or received such

property knowing it to have been so stolen or obtained. This presumption may, however, be rebutted by proof.

"3. When in a prosecution under this section it shall appear from the evidence that the defendant's principal business was as set forth in the preceding paragraph, that the defendant bought, received, or otherwise obtained, or concealed, withheld or aided in concealing or withholding from the owner, any property which had been stolen or obtained in any manner constituting theft or extortion, and that the defendant bought, received, obtained, concealed or withheld such property under such circumstances as should have caused him to make reasonable inquiry to ascertain that the person from whom he bought, received, or obtained such property had the legal right to sell or deliver it to him, then the burden shall be upon the defendant to show that before so buying, receiving, or otherwise obtaining such property, he made such reasonable inquiry to ascertain that the person so selling or delivering the same to him had the legal right to so sell or deliver it. . . ."

IV.

STATEMENT OF THE CASE.

Petitioner HUGO F. FORSTER and MARGARITO O. ROMERO were indicted on or about October 13, 1976 in a ten-count federal indictment for nine counts of transportation in interstate commerce of stolen gold, in violation of 18 U.S.C. Section 2314 and one count of conspiracy to transport stolen gold in interstate commerce, in violation of 18 U.S.C. Section 371. (CT, 1-5) The first four counts were based upon transactions involving defendants alleged to have taken place between November, 1973 and May, 1974, at the R & F Metals Company, in San

Bruno, California. (See, *e.g.*, stipulated testimony of Anatole Yaroslav at CT 561-562). The fifth, sixth, eighth and ninth counts were based upon transactions involving Romero only between July, 1974 and March, 1975, while the seventh count was based upon a transaction involving Forster only in October, 1974. The first through sixth and eighth counts involved purchases from one Raymond Hosman; the seventh, a purchase from one Joseph Tony Lucero; and the ninth, a purchase from one Hugo R. Henriquez. (See, *e.g.*, the reporter's transcript of Grand Jury proceedings, CT 234 *et seq.*) The nine overt acts alleged in the conspiracy count of the indictment, as to which evidence was presented for seven, involved purchases from Hosman, Lucero, and one Lawrence Hodge. (See, *e.g.*, witness list, CT 525) Based upon a stipulated statement of the testimony of witnesses and upon business records of the R & F Metals Company (CT 522-690) the appellants were adjudged guilty on all counts charged, on August 8, 1977 (CT 703, 704).

The convictions were the end result of two and one half years of state and federal investigation and litigation. Involvement in the case by Mifflin Singleton of the South San Francisco Police Department began in February, 1975 (RT 74:6-8). Some time after February 7, 1975, Singleton contacted the San Mateo office of the F.B.I. Agent Lee Pointer of that office took part in a two-week surveillance of appellant Romero's business in late March, 1975 (RT 75:18-24) and was present during "95 percent of it." (RT 77:1) (See also affidavit of F.B.I. Agent Freddie Capps, at CT 203.) Federal agencies involved in the early investigation included the Post Office (RT 79:21-25) and the

United States Secret Service (RT 81:20-82:14), and the prosecutor herein indicated that federal agencies initiated the investigation (RT 8:2-9).

On May 2, 1975, and June 17, 1975, respectively, Singleton obtained search warrants for the premises of Romero and Forster, respectively, describing the items to be seized as

> business records, telephone records, checks and check stubs, receipts for sale and purchase, and any other stolen items, consisting of gold, silver and other precious metals

(CT 192-195) Pursuant to these warrants, the South San Francisco Police seized *all* the business records of M. O. Romero and Company, R & F Metals, and Hugo F. Forster and Company, totaling over 50,000 documents in the case of the search of Romero's premises, and over 10,000 in the case of the search of Forster's premises (affidavit of Paul Hupf, CT 185).

Prior to the execution of these warrants, neither the South San Francisco Police (RT 83-85) nor the F.B.I. (RT 155-157) had knowledge of any of the transactions or witnesses relating to stolen gold in this case. More specifically, Detective Singleton testified in the District Court that the names of Lawrence Hodge, Henry Ceasar, David Rose, Larry Price, Raymond Hosman, Earl Costner and Joseph Lucero, all key witnesses in both the state and federal cases, were obtained as a result of these searches. (Compare RT 83-85, CT 524. See also RT 124-125.)

Romero and Forster were arrested on May 5, 1975, and June 18, 1975, respectively, on state charges. (Affidavit of Ephraim Margolin, CT 310:10-15) The F.B.I. participated in Romero's arrest. (See affidavit of Freddie Capps, CT 206). The prosecution in this case stipulated that there was cooperation between the F.B.I. and the San Francisco Police Department throughout the state proceedings; this stipulation was for the purpose of avoiding a discovery request as to such cooperation with regard to the state search, the preparation of the state search warrants, the state arrests, and preparation of the state case. (RT 15-17, CT 29-34) On the present record it may therefore be concluded that there was cooperation as to all of these matters. The District Court found that there was a "joint state and federal investigation," and that

> State and federal authorities frequently exchanged information within their possession, and otherwise cooperated closely throughout the investigation of defendants.

(Memorandum decision on pretrial motions, CT 498:17-23)

In August, 1975, FBI Special Agent Freddie Capps examined the records seized by the South San Francisco Police Department. (RT 203:1-4, CT 453:3-7.) The only independent FBI investigation of which Detective Singleton was aware was at least a week's examination by Capps of the records seized by the South San Francisco Police (RT 109-111). All the records seized pursuant to the two warrants were made available to Capps (RT 111:6-8). These records were the indispensable core of the State case against appellants and later, of the federal case.

Capps was later to become the affiant on the federal warrant (CT 207). He testified at the federal suppression hearing that prior to his examination of the materials he had no knowledge of the transactions underlying the federal indictment (RT 155-157, CT 149-154). Through his contacts with Singleton, he was aware well in advance of the state suppression motion. (RT 158) The prosecution herein refused to divulge its reasons, if any, for failing to commence a prosecution simultaneously with the state prosecution (RT 164-165).

During the period in which FBI and South San Francisco Police Department officers were sifting through the quantities of materials seized under the State warrants, the case was proceeding through preliminary stages in the San Mateo County Municipal Court. Despite admissions by the prosecutor that quantities of totally irrelevant materials had been seized, and despite court orders to return the irrelevant materials, the District Attorney continued to withhold vast quantities of business records until contempt proceedings were brought against him. Rather than abiding by the rulings of the Municipal Court, the District Attorney abandoned preliminary proceedings in the Municipal Court and sought an indictment from the San Mateo County Grand Jury (affidavit of Ephraim Margolin, CT 313-316). FBI agents were aware of all these events (CT 316:12-15).

On October 22, 1975, the San Mateo County Grand Jury issued an eleven-count indictment against Romero and Forster, charging receipt of stolen property and conspiracy. With the exception of one count (No. II) against Romero in the State indictment and one count (No. 9)

against Romero in the subsequent federal indictment, all transactions alleged in the San Mateo County indictment were identical to those alleged in the indictment in the present case. (For a detailed comparison, see the discussion in defendants' "Memorandum in Support of Motion to Dismiss for Speedy Trial Violations," at CT 294-296, and the supporting documents).

A motion to suppress all material seized under the State warrants was filed pursuant to California Penal Code Section 1538.5, and hearings were commenced on March 18, 1976, in the Superior Court, San Mateo County (affidavit of Paul Hupf, CT 184, 185). The suppression motion was made on the grounds that neither the items to be seized nor the premises to be searched were described with constitutionally sufficient particularity, and that the affidavit in support of the warrant was insufficient and false in material respects (affidavit of Paul Hupf, CT 184:11-19). The motion was granted in its entirety on March 30, 1976 on the stated grounds that "The search warrants are on their face constitutionally overbroad as to the description of the property to be seized." (CT 196:24-25) The ruling is supported by the above-quoted language of the warrants themselves, was not appealed by the State prosecution, and was conceded to be correct as a matter of federal constitutional law by the United States Attorney in the present case. (See, *e.g.*, memorandum opinion of the District Court, Note 1, CT 500.)

On April 8, 1976, the District Attorney sought and was granted dismissal of all counts of the state indictment except the ninth (against Romero only), conceding that there was no evidence against the appellants as to the other

counts except that which had been suppressed. (CT 186, RT 62) The District Attorney stated to the Court that he would prepare an order for return of the suppressed evidence (RT 62), but did not do so. Defense counsel set the matter for hearing before the presiding judge of the Superior Court criminal calendar on April 26, 1976. The presiding judge did not rule on the matter but set it for hearing on April 28, 1976 before the judge who had heard the suppression motion (CT 187). On April 28, following discussions in chambers at which the United States Attorney, the District Attorney, and Special Agent Capps were present, the Superior Court ordered return of the seized documents, notwithstanding the existence of a federal warrant for their seizure from the District Attorney, the existence of which had not been previously known to the defense (CT 187, RT 64).

The federal warrant had been prepared at the request of the District Attorney for the reason that he considered that he would be held in contempt if he did not return the seized materials, and "because I was an Officer of the Court and was holding this evidence for the benefit of the Court." (RT 96:6-7) The federal warrant was prepared with the assistance of Detective Singleton (RT 119:1-3), who discussed with Special Agent Capps the week prior to its issuance the fact of the suppression and told him what material was present in the District Attorney's office (RT 114-115).

The federal warrant, directed to the office of the District Attorney, specified the materials to be seized as

> . . . certain property, namely business records that consist of individual purchase and sales transactions of metals by R & F Metals, Incorporated; Hugo F. Forster and Company; and M. O. Romero and Company for the years 1971, 1972, 1973, 1974, and 1975; specifically, checks, purchase orders and attached correspondence, invoices, business diaries, and customer contact cards that relate to purchases from the Simmons Refining Company, Paul Norboe, Motherlode Wood Company, Hewlett-Packard, G.T.E. Lenkurt, Hughes Aircraft, *and private individuals,* or sales to any of the above named companies or individuals, which are the instrumentalities of a crime in violation of Title 18, U.S.C., Section 2314—Interstate Transportation of Stolen Property.

(Emphasis added. CT 198, 200) *On its face,* the supporting affidavit might be said to have supplied probable cause for seizures of documents related to the *named* companies and individuals; but the only justification for seizure of documents related to anyone else was contained in the last paragraph of the affidavit, which alleged,

> On April 23, 1876, Detective Singleton advised that all records relating to the South San Francisco Police Department and the San Mateo County District Attorney's Office case against Romero and Forster are now being maintained in the office of Deputy District Attorney Charles Pierpoint, III.

(Affidavit of Freddie Capps, CT 207). In particular, documents relating to transactions with Hodge, Ceasar, Rose, Price, Hosman, Costner, and Lucero were not covered by the federal warrant except for its general reference to "private individuals,"[1] were not covered by Capps' affidavit

[1]The Government conceded on appeal that the reference to "private individuals" in the federal warrant was *not* a reference to any of the individuals mentioned here. Note 5, brief of appellee, at 6.

except insofar as it referred to the location of records from the state case and would not have been in the possession of the District Attorney (or at that late date, necessarily in *anyone's* possession) except for the unconstitutional overbreadth of the original warrant. These documents became critical evidence in the present case (RT 5:8-16, exhibits 1a through 4d, CT 575-609: purchase orders and cancelled checks seized under the federal warrant which refer to transactions with Hodge, Ceasar, Hosman, and Lucero and in no way refer to the companies named in the federal warrant).

Appellants sought return of the matters seized pursuant to the federal warrant in a separate proceeding in the District Court, which application was denied without reaching the merits (CT 289, 290, and Memorandum in Support of Suppression Motion, CT 169:1-14). Subsequently, a motion to suppress was brought in the District Court, going to the evidence seized under the state warrants and seized again under the federal warrant and to the fruits thereof. (See Suppression Motion, CT 157 *et seq.*, oral argument, RT 50:17-22, and Supplemental Memorandum CT 487 *et seq.*).

In an extensive evidentiary hearing on the suppression motion, Detective Singleton of the South San Francisco Police Department and Special Agent Freddie Capps of the FBI both testified that the only source of the names of Hodge, Ceasar, Hosman, and Lucero was the material seized under the State warrants, held by the District Attorney and reseized under the federal warrant (RT 83-85, RT 155-157), but both asserted that all the information contained in the affidavit supporting the federal warrant

was known prior to execution of the State warrant (RT 118-123, RT 200-202).

Both appellants contested admission of business records and the stipulated testimony of Hodge, Ceasar, Price, Hosman, Rose, and Morgan as fruits of an illegal search in their trial memoranda (CT 512-513, 692-693) and pointed out that the facts clearly established that the place to be searched pursuant to the federal warrant, namely, the office of the District Attorney, was learned as a result of the State search. All pretrial issues were preserved at trial (CT 696).

The District Court denied the suppression motion *in toto*. It made a finding that the federal *warrant* was untainted by the fruits of the State search but made no finding as to whether, but for the state search, the FBI would have been able to obtain the material seized.

Petitioner Forster moved to dismiss for violation of his right to a speedy trial. This motion was based upon the argument that when federal officials participate in a state investigation and arrest, and state charges are from the same criminal acts for which subsequent federal charges are filed, a defendant should be deemed accused for Sixth Amendment purposes from the date of the state arrest or indictment return than from the date of the federal arrest or indictment. (CT 28 *et seq.*). He provided evidence of the type of prejudice usually considered in relation to post-accusatorial delays but not of the type usually considered in relation to pre-accusatorial delays. Forster filed a five-page affidavit detailing the adverse effects of delays in the federal prosecution on his defense and upon his personal affairs, noting particularly that his finances had been deci-

mated, his ability to pay for his defense destroyed, his access to witnesses hampered, and his access to his own business records cut off (CT 476 *et seq.*). The District Court deemed the date of the federal indictment to be controlling, however, and denied the motion on that basis. (CT 507-508).

Petitioner Forster's motion to dismiss for grand jury abuses (CT 210 *et seq.*) was based upon the transcript of the grand jury proceedings, which was totally devoid of evidence with respect to some of the charges and was exclusively hearsay, without the grand jury having been instructed on the nature of evidence which would be admissible at trial. (See CT 23 *et seq.*, the grand jury transcript). The motion was denied.

Petitioner was adjudged guilty by the Court on all counts, based upon stipulated testimony and documentary evidence.

Petitioner appealed on the grounds that his Fourth Amendment rights and Sixth Amendment speedy trial rights had been denied and that the District Court had erred in denying the grand jury motion. Judgment was affirmed on August 16, 1978, Senior Circuit Judge Charles Merrill dissenting on the grounds that this case is indistinguishable from *Elkins v. U.S.*, 364 U.S. 206 (1960). Petitioner sought a rehearing and rehearing in banc, denied by order of November 3, 1978, Judge Merrill again dissenting.

V.

ARGUMENT.

A. Petitioner's Fourth Amendment Rights Were Denied.

To reiterate the facts on which the suppression motion in this case was based, there was in this case a federal warrant directed at the office of the San Mateo County District Attorney, who held business records of the petitioner seized pursuant to an overbroad state warrant. The materials in the federal seizure included evidence essential to petitioner's conviction, which federal officials had no independent probable cause to seize and which would not have been in the hands of the District Attorney but for the overbreadth of the original warrant. While the District Court found that there was an independent basis for the facts alleged in the federal warrant for seizure of a narrow class of business records, there was no independent basis for seizure of the evidence which came into the District Attorney's possession as a result of the overbreadth of the original seizure. Finally of note is the conceded federal participation at all stages of the state proceeding, the fact that the state and federal charges were for the same criminal acts, and the fact that the issuance of a federal warrant was admitted by the District Attorney to have been at his request, solely to protect him from a contempt citation in state court.

When facts similar to the above came before this Court in *Elkins v. United States*, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437 (1960), this Court observed:

> "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in

an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution.

• • •

"Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered."

This observation applies with all the more force in the present case. The facts in *Elkins*[2] were essentially identical to those in the present case, except for the following:

(1) There is no indication in the *Elkins* opinion that federal officials had no independent, "untainted" basis for obtaining the evidence. In the present case, but for the illegal state seizure, the federal officials could not have obtained the incriminating evidence seized, *cf. Wong Sun v. United States,* 371 U.S. 471, 488, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).

[2]set forth in note 1, 364 U.S. at 207.

(2) In *Elkins* the federal warrant was directed at a bank vault; here it was directed at the District Attorney.

(3) In *Elkins,* as noted by the Ninth Circuit in its opinion herein (note 7 of slip opinion), there was no state court order to return the illegally seized evidence, Here, the federal warrant was issued by a federal magistrate not informed by federal law enforcement officials that its purpose was to shield the District Attorney from a contempt citation for failing to carry out a court order to return.

(4) In *Elkins,* as noted by the Ninth Circuit in its opinion in that case, *Elkins v. United States,* 266 F.2d 588, 594 (1959), "[T]he motion did not say nor does the record show, that any federal officer participated in the state search and seizure." Here, there was federal participation in *every phase* of the state case, stipulated to by the U.S. Attorney. *Cf., Gambino v. United States,* 275 U.S. 310, 314, 48 S.Ct. 137, 72 L.Ed. 293 (1928).

(5) In the present case, the federal affiant spent a week sifting through the illegally seized materials before they were seized again under the federal warrant prepared by him.

In short, this case is indistinguishable from *Elkins* except for reasons additional to those in *Elkins* for suppression here. Here, suppression was mandated because federal possession of the fruits of the state warrant's overbreadth constituted exploitation of the illegal search in violation of the principles established in *Silverthorne Lumber Company v. United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 647 (1920) and *Wong Sun v. United States, supra,* and, additionally, because of federal participation in the investigation

and arrests leading up to the illegal "state" search, in violation of the principle set forth in *Gambino v. United States,* 275 U.S. 310, 314, 48 S.Ct. 137, 72 L.Ed. 293 (1928) that "Evidence obtained through wrongful search and seizure by state officers who are cooperating with federal officials must be excluded."[3]

The principle established in *Elkins* that the federal courts are not to undercut state protection of federal constitutional rights complements principles of comity established in recent cases in this Court. The cooperation of state and federal officials to use an *ex parte* federal warrant proceeding to circumvent state court orders in this case was in clear violation of these principles. In *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 609, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), this Court outlawed "federal post-trial intervention in a fashion designed to annul the results of a state trial" when the "losing litigant has not exhausted his state appellate remedies."[4] That is precisely what happened in the present case. To permit state officials, after having lost a suppression motion on federal constitutional grounds, to turn the fruits of the illegality over to federal officials for a federal prosecution of the same crimes, would permit the clearest violations of the complementary principles of federalism which *Elkins* and *Younger* were intended to protect.

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[3]The existence of state-federal cooperation remains a factor to be considered under recent decisions. See, e.g., *United States v. Janis,* 428 U.S. 433, 49 L.Ed.2d 1046, 96 S.Ct. 3021 (1976), note 31 and surrounding text, 428 U.S. at 455.

[4]See also, *Younger v. Harris,* 401 U.S. 37, 41, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971) and *Kugler v. Helfant,* 421 U.S. 117, 44 L.Ed.2d 15, 95 S.Ct. 1524 (1975).

B. The District Court Erred In Denying Petitioner's Motion To Dismiss For Speedy Trial Violations.

The federal prosecution in this case was completely parallel to the prior state prosecution. The federal prosecution involved shipments in interstate commerce of stolen merchandise, and a conspiracy to make such shipments, while the state prosecution involved receipt of the same stolen merchandise and a conspiracy to make such receipts. The same facts, same evidence, same criminal acts were involved in each case, and there was federal-state cooperation at every stage of both the state and the federal prosecution. Yet, the federal prosecution was not commenced until the state prosecution had been dismissed, and the U.S. attorney refused to explain the delay.

When a federal prosecution is preceded by a state prosecution for the same criminal acts, the circuits are divided as to the date on which the defendant becomes "accused" for the purposes of the Sixth Amendment.

In *United States v. Diggs,* 497 F.2d 391, 393 (2d Cir., 1974), it was held that one had become accused for the purposes of Sixth Amendment right to counsel at the time of a state indictment, prior to federal indictment, when "the state and federal charges were for the same crime [and] the federal people knew it."

In *United States v. DeTienne,* 468 F.2d 151, 155 (7th Cir., 1972), *cert. denied,* 93 S.Ct. 974, it was held that the time for a speedy trial does not run from the date of arrest on an unrelated charge but that

> "Of course, if the crimes for which a defendant is ultimately prosecuted really only gild the charge

> underlying his initial arrest and the different accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses."

In *United States v. Cabral,* 475 F.2d 715 (1st Cir., 1973), the defendant, arrested first by state police for possession of stolen property (a firearm), was later charged with the federal offense of possessing a firearm (the same one) not identified by a serial number; the First Circuit determined that the speedy trial provisions should run from the date of the state arrest. *Cabral* was cited in *Dillingham v. United States,* 423 U.S. 64, 46 L.Ed.2d 205, 96 S.Ct. 303, for the proposition that "the policies that inform the right to a speedy trial reach beyond the indictment stage. . . ."

In the Ninth Circuit, however, the present case and *United States v. Cordova,* 537 F.2d 1073 (1976) have concluded that whether or not the state charges are "for the same illegal activity as that in the federal prosecution," *Cordova,* 537 F.2d at 1076 the defendant does not become "accused" for federal purposes until federal charges are filed. In the present case, it would appear particularly justifiable to "start the clock running" from the state arrests and indictment, since federal agents were cooperating with state law enforcement from the beginning, even to the extent of being physically present at co-defendant Romero's arrest.

When "pre-accusatorial" delays are involved, the issue is whether the delays have denied the defendant a fair trial under Fifth Amendment standards. *United States v. Marion,* 404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 455 (1971). Once one has become "accused," however, prejudice is measured by standards related to the purposes of the speedy trial requirement. These were set forth in *Smith v. Hooey,* 393 U.S. 374, 377-378, 89 S.Ct. 575 (1969) as follows:

> "[T]his constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: '[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will fend himself.' *United States v. Ewell,* 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627."

See also *Barker v. Wingo,* 407 U.S. 514, 532, 33 L.Ed.2d 101, 118, 92 S.Ct. 2182 (1972). In the present case, the undisputed affidavit of petitioner established prejudice relating to the second and third purposes: severe effects on the petitioner's reputation, family life, and business affairs related to the accusations against him. It is conceded, however, that the burden of proving a Fifth Amendment violation was not met.

In *United States v. Marion,* 404 U.S. 307, 321, 30 L.Ed.2d 468, 92 S.Ct. 455 (1971), this Court stated:

> *"Invocation of the speedy trial provisions thus need not await indictment, information, or other formal charge.* But we decline to extend the reach of the amendment to the period prior to arrest. *Until this event occurs, a citizen* suffers no restraints on his liberty and *is not the subject of public accusation:* his situation does not compare with that of a defend-

ant who has been arrested and held to answer." (emphasis added.)

The language refers to "public accusation," not "federal accusation." Moreover, the first sentence quoted is footnoted to the ABA standards relating to speedy trial, Rule 2-2(a), which start the time running for a speedy trial from the date on which the defendant is held to answer "for the same crime or a crime based on the same conduct or arising from the same criminal episode." Thus, the time runs not from arrest or indictment for the particular offense of which the individual is charged, but from arrest or indictment for any offense arising from the same conduct, including a state offense. This is as it should be, because the effects on the defendant are the same whether the same jurisdiction files the original charges or not.[5] Moreover, the existence of distinct jurisdictions should be of no constitutional significance where, as here, there has been continual state-federal cooperation; where, as here, the federal charges only "gild" the state charges *DeTienne, supra;* where, as here, "the state and federal charges were for the same crime [and] the federal people knew it"; and, where, as here, the U.S. attorney has refused to explain the delay.

C. The District Court Erred In Denying Petitioner's Motion To Dismiss For Grand Jury Abuses.

The present case raises an issue as to which the circuits are divided. The indictment herein was based entirely upon

[5]Congress, in adopting the Federal Speedy Trial Act, concurred with the ABA's "same criminal episode" language in dealing with the problem of the present case: two successive prosecutions. See 18 USC Section 3161.

hearsay, none of which would have been admissible over objection. A quick perusal of the grand jury transcript reveals that, given the manner in which the case was presented, the jurors had no opportunity independently to assess the strength or weakness of the Government's case.

Petitioner does not contest the grand jury's right to consider hearsay or evidence subject to the exclusionary rule. However, the Second Circuit has held that the U.S. Attorney must inform the grand jury that the evidence they are hearing would be inadmissible at trial. *United States v. Estepa,* 471 F.2d 1132 (1972). The Ninth Circuit, in the present case and in *United States v. Chanen,* 549 F.2d 1306 (1977) has disagreed with the Second Circuit rule.

This Court has held that a grand jury may consider hearsay, *Costello v. United States,* 350 U.S. 359, 362, 100 L.Ed. 397, 76 S.Ct. 406 (1956) and evidence subject to the exclusionary rule at trial, *United States v. Calandra,* 414 U.S. 338, 38 L.Ed.2d 561, 94 S.Ct. 613 (1974). On the other hand, this Court has also recognized the Grand Jury's

> "historic office . . . to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a respresentative body of citizens acting under oath and under judicial instruction and guidance." *United States v. Mandujano,* 425 U.S. 564, 571, 48 L.Ed.2d 212, 219, 96 S.Ct. 1768 (1976).

and the Grand Jury's duty to act "as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *United States v. Dionisio,* 410 U.S. 1, 16-17, 35 L.Ed.2d 67, 81, 93 S.Ct. 764 (1973). These cases

can only be reconciled if the grand jury must be informed of "the shoddy merchandise they are getting so they can seek better if they wish." Friendly, J., dissenting in *United States v. Payton,* 363 F.2d 996, 1000 (2d Cir., 1966).

Moreover, the recognition in *Calandra, supra,* that the grand jury has an obligation to determine the existence of probable cause, 414 U.S. at 342, implies that there must be *some* evidence as to each element of each charge before an indictment can be made. Here, as to some charges, there was not.

CONCLUSIONS

The present case represents a serious violation of the Fourth Amendment principles set forth in *Elkins v. United States, supra.* Moreover, it presents a conflict among circuits as to the time at which a defendant becomes "accused" for Sixth Amendment purposes when there are successive state and federal prosecutions for the same criminal conduct. Finally, it presents a conflict among circuits as to the prosecutor's duty to inform the grand jury of the inadmissibility of hearsay evidence presented to them. For these reasons certiorari should be granted and the judgment reversed.

Dated: November 27, 1978.

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(Appendices Follow)

Appendices

APPENDIX A

United States Court of Appeals
For the Ninth Circuit

United States of America, Plaintiff-Appellee, vs. Margarito O. Romero, Defendant-Appellant.	No. 77-2964
United States of America, Plaintiff-Appellee, vs. Hugo Frederic Forster, Defendant-Appellant.	No. 77-2969

[Filed August 16, 1978]

Appeal from the United States District Court
For the Northern District of California

OPINION

Before: MERRILL, Senior Circuit Judge; SNEED, Circuit Judge; and EAST,* Senior District Judge

EAST, Senior District Judge:

THE APPEALS:

Appellant Margarito O. Romero appeals her judgment of conviction and sentence to custody on eight counts of violating 18 U.S.C. § 2314 (stolen gold transported in inter-

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

state commerce) and one count of violating 18 U.S.C. § 371 (conspiracy).

Appellant Hugo Frederic Forster appeals his judgment of conviction and sentence to custody on five counts of violating § 2314 and one count of violating § 371.

The appeals were consolidated for hearing and disposition.

We note jurisdiction and affirm.

PROCEEDINGS IN THE DISTRICT COURT:

Romero and Forster were jointly indicted on October 13, 1976. The charges under §§ 2314 and 371 covered the period of November, 1973 through March, 1975. The District Court denied the several motions of Romero and Forster for the suppression of documentary evidence seized under federal search warrants from the possession of state law enforcement officers. The District Court also denied appellants' motions for dismissal on the grounds of speedy trial violations and abuse of the grand jury process. Romero and Forster were tried to the District Court without a jury upon a stipulation of facts and the admission in evidence of the various federally seized documents under illegal seizure challenge. The judgments of conviction and sentences to custody were duly entered. Romero and Forster are each at liberty pending appeals.

FACTS:

During 1973, the United States Secret Service uncovered information that R & F Metals (R & F), Romero and Forster's metal processing business, was shipping gold, believed to have been stolen from a mine in Nevada, to Chi-

cago, Illinois. This information was subsequently provided to the South San Francisco Police Department which had been conducting its own investigation into R & F's gold business triggered by information from a local refinery.

In March, 1975, Detective Singleton of the South San Francisco Police Department contacted the Federal Bureau of Investigation (FBI), which then began its own investigation of R & F's gold trafficking. The FBI investigation was extensively pursued both on an independent basis and in conjunction with state law enforcement authorities.

The South San Francisco Police Department executed state search warrants upon the premises of Romero and Forster on May 2 and June 17, 1975, respectively, and seized all documents and records pertaining to the manner in which they conducted their businesses. During August and September, 1975, hearings were held in the state court resulting in the prosecutor's agreement to return all items not deemed by him to be relevant to the prosecution. This return was not fully accomplished until early 1976 after contempt proceedings had been instituted by Romero and Forster. Meanwhile, however, the police had segregated the documents deemed to be relevant and moved them from the police garage to Detective Singleton's office. Later, when approximately 70 to 80 percent of the documents had been returned to Romero and Forster, most of those documents retained were transferred from the police department to the prosecutor's office for use in the state prosecution.

In August, 1975 and before Romero and Forster had filed their state court motions to suppress the evidence,[1] the records, at that time still in the police garage, were made available to the FBI and were examined by federal agents in connection with their independent investigation. Additionally, those documents found relevant by the police and transferred to Singleton's office were later re-examined.

On October 22, 1975, Romero and Forster were indicted in the Superior Court for San Mateo County, California for a variety of state offenses.

In late March of 1976, Judge Haverty of that Court suppressed the state search warrants and seizure solely on the ground that the warrants' description of the items to be searched for and seized was too broad.[2] As a result of this ruling, the majority of the case against Romero and the entire case against Forster were dismissed.

On April 26, 1976, the FBI, under authorization of the United States Attorney's office, secured and executed three federal search warrants for Romero's home, Forster's business office, and the office of the state prosecutor.[3]

The federal warrants were supported by affidavits which contained no significant information which was not avail-

[1]Romero and Forster imply that the FBI was aware that the documents they examined in August of 1975 had been illegally seized. This allegation is incorrect; it was not until late August and September, 1975, that Romero and Forster requested the return of certain documents during *preliminary* state court motions.

[2]The Government conceded below that the state seizures were unlawful under federal constitutional standards.

[3]The state prosecutor handling the case stated that if the federal government wanted the documents in his possession, a search warrant for his office would be required as the documents were technically not in his possession in that he had been ordered by the state court to return the records.

able to the FBI prior to the issuance and execution of the state warrants. Detective Singleton aided in the preparation of the federal warrants and testified that he gave the FBI only information known to him before the state seizures.

Immediately prior to the execution of the federal warrants, the Assistant United States Attorney in charge of the federal investigation met with Judge Haverty to inform him of the pending search warrants for the state prosecutor's office, Romero's home, and Forster's business. Judge Haverty expressed no objection to the procedure to be utilized by the federal government in order to obtain the records and he did not indicate that he believed seizure pursuant to the federal warrants would violate the spirit of his order suppressing the evidence. On April 28, 1976, Judge Haverty ordered the records returned to their rightful owners.

ISSUES ON REVIEW:

We deem the dispositive issues to be:

1. Did the District Court err in denying Romero's and Forster's motions to suppress the evidence seized under the federal warrants?

2. Were Romero and Forster denied the right to a speedy trial in violation of the Sixth Amendment of the United States Constitution or were they denied due process by reason of prejudicial indictment delay in violation of the Fifth Amendment of the United States Constitution?

3. Did the District Court err in failing to dismiss the cause of grounds of abuse of the grand jury?

DISCUSSION:

I. Motion to Suppress the Fruits of the Federal Search Warrant.

Romero and Forster contend that the evidence introduced at trial is the direct "fruit" of the unlawful state seizure and was discovered and utilized through a direct exploitation of the illegal state seizure. As such, they contend, it must be suppressed. Appellants also assert that even if the federal warrant was not tainted by the illegal state seizure, the evidence must nevertheless be suppressed in order to effectuate the policy behind the exclusionary rule; *i.e.*, the deterrence of official misconduct. *See Stone v. Powell,* 428 U.S. 465, 486 (1976); *United States v. Janis,* 428 U.S. 433, 458-59 n.35 (1976).

In addressing the problem of whether the evidence sought to be suppressed was gathered through exploitation of an illegal search, the District Court, in a scholarly and well analyzed memorandum, applied the legal standard expressed in *Wong Sun v. United States,* 371 U.S. 471 (1963), and *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920),[4] and concluded:

> "By now it is well established that evidence unlawfully seized does not thereby become 'immune' from use by law enforcement agencies. Rather, so long as the evidence derives from a source independent of the prior illegality, it may be admitted into evidence."

[4]Appellants' complaints concerning the District Court's asserted reliance on the "inevitable discovery rule" are unfounded. In any event, the District Court did not significantly rely upon this doctrine as a basis for its opinion.

We agree with that premise. In *United States v. Ceccolini,* ____ U.S. ____, No. 76-1151 (March 21, 1978) (Slip Op. pp. 5 & 6), the Court stated:

> "The constitutional question under the Fourth Amendment was phrased in *Wong Sun* . . . as whether 'the connection between the lawless conduct of the police and the discovery of the challenged evidence has become "so attenuated as to dissipate the taint."' *Id.* at 487, 491. The question was in turn derived from the Court's earlier decision in *Nardone v. United States,* 308 U.S. 338, 341 (1939), where Mr. Justice Frankfurter stated for the Court:
>
> "'Here, as in the *Silverthorne* case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively. 251 U.S. 385, 392.
>
> "'In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.'"

On the factual issue of the illegal action taken by the state and any possible taint, the District Court found:

> "An examination of the *affidavit* attached to the *state* search warrant reveals that the facts permitting adequate specificity in the *federal* warrant were known prior to the state seizure. . . .

> ". . . Similarly, by essentially restating the facts recited in the state affidavit, and thus known prior to the unlawful [state] seizure, the federal affidavit provided adequate untainted basis upon which to derive the descriptive terms employed by the federal warrant." (Emphasis in original).

The District Court concluded therefrom "that the evidence unlawfully seized by the state was not utilized in the preparation of the federal affidavit or warrant."

Viewing the evidence in the light most favorable to the Government, *Glasser v. United States,* 315 U.S. 60 (1942), we agree with the District Court's findings that the federal warrant was based on information obtained prior to the execution of the state warrant and was untainted by the illegally seized evidence.

Romero and Forster assert that even if the evidence seized under the federal warrant is found not to be the fruit of the invalid state search, the evidence must nevertheless be suppressed.[5] They contend that the federal warrant is merely an attempt to cure a prior illegal search and that policy considerations underlying the exclusionary rule demand exclusion of the evidence to deter otherwise unreviewable police conduct.

In this vein, the District Court proceeded to evaluate the potential for unlawful searches despite an independent factual basis for the search:

> "A certain class of cases, however, prove somewhat anomalous under this approach. This is where the authorities have sufficient information to secure a search warrant, but prior to doing so they conduct an unlawful search either to confirm their suspicions, or for some other purpose.

[5]Romero and Forster's contention that the FBI should have proceeded by way of a subpoena duces tecum rather than a search warrant is unfounded. *Zurcher v. Stanford Daily,* 46 U.S.L.W. 4546 (U.S. May 31, 1978).

> . . .
>
> "*United States v. Griffin,* [502 F.2d 959 (6th Cir. 1974)], involved the unlawful search and seizure of a dwelling by police, while other officers secured a search warrant. Although a warrant based upon previously obtained information was issued and executed, the evidence was nevertheless suppressed. Rejecting the government's contention that the evidence unlawfully seized would have been 'inevitably discovered' pursuant to the search warrant, the court concluded that exclusion of the evidence was the only practical means of deterring unlawful police conduct.
>
> "*Krauss v. Superior Court,* [5 Cal. 3d 418 (1971)], reached the opposite result. There, police had probable cause to obtain a warrant but prior to doing so conducted a warrantless search to confirm their suspicions. The court concluded that the evidence was admissible as based upon sources independent of the unlawful search. 'To hold otherwise would go beyond excluding evidence unlawfully obtained and in effect grant petitioner immunity from prosecution because of the officer's collateral wrong.' 5 Cal.3d at 423. Cf. *Wayne v. United States,* 318 F.2d 205, 209 [(D.C. Cir.), *cert. denied,* 375 U.S. 860 (1963)]; *United States v. Bravo,* 403 F. Supp. 297 (S.D. N.Y. 1975).
>
> "In deriving the outer perimeters of the exclusionary rule, courts have been guided largely by a reasoning process which balances the deterrence value of excluding a particular class of evidence against the policies in favor of admitting all evidence relevant to the fact-finding process. Thus the exclusionary rule, even as

applied to the direct fruits of unlawful police activity, has been circumscribed in a variety of contexts in which the deterrence principle alone might logically be deemed to apply.[3] Analogously, the issue presented by *Griffin* and *Krauss* is whether the rule ought to be expanded under certain circumstances to encompass even untainted evidence where necessary to deter egregious police conduct.

"*Krauss* and *Griffin* involve circumstances inviting intentional and extensive violation of Fourth Amendment rights through police practices without independent justification. Even were we inclined to apply the exclusionary rule in the context of these cases, we would find the instant case to be distinguishable.

"Had the state's seizure of defendants' papers been lawful, federal examination of that evidence while in the possession of the state would not have constituted an independent 'search' necessitating the execution of a search warrant. See *U.S. v. Gargoeto* [*sic.*], 476 F.2d 1009 (6th Cir. 1973), *cert. denied* 421 U.S. 987 [1975]; *U.S. v. DeBerry*, 487 F.2d 448 (2d Cir. 1973); *Gullett v. U.S.*, 387 F.2d 307 (8th Cir. 1967), *cert. denied* 390 U.S. 1044 [1968]; *U.S. v. Nugent*, 389 F. Supp. 817 (W.D. Louisana [sic] 1975); but Cf. *U.S. v. Birrell*, 470 F.2d 113, 117 (2d Cir. 1972). This rule appears largely designed to avoid complex procedural barriers to cooperation between state and federal law enforcement authorities. Its theoretical underpinning must be that examination by another law enforcement agency is not a sufficiently distinct intrusion into the defendants' privacy to trigger the requirements of the Fourth Amendment.

"While federal examination of documents unlawfully seized by the state is clearly an 'exploitation' of the *state's* unlawful seizure, the fruits of which are barred

from federal court, *Elkins v. United States*, 364 U.S. 206 (1960), whether such conduct prior to suppression by the state court constitutes a federal 'search,' and thus an independent violation of the Fourth Amendment, is less than clear. The analogy to *Krauss* and *Griffin* may fail for this reason alone. In any event, it is evident that the potential for intrusive conduct by police under the circumstances of the instant case is vastly less than sanctioned by *Krauss* and rejected by *Griffin*. See *United States v. Bacall*, 443 F.2d 1050, 1057 (9th Cir. 1971). Nor do we believe that this procedure furnished a significant incentive for the initial unlawful search by state authorities.

"Moreover, collateral policy considerations militate against application of the exclusionary rule in this context. Before utilizing evidence seized by the state, federal authorities under such a rule would be obligated to conduct an independent inquiry and evaluation into the lawfulness of a state seizure. Where doubt as to legality persisted, federal authorities would either have to suspend their investigation until the completion of suppression proceedings, or seize or subpoena the evidence while it was still the subject of proceedings before the state courts. We think that the effects of the rule urged by defendants would be unduly burdensome in either case, while only marginally protective of rights secured by the Fourth Amendment."

"[3]See e.g., *United States v. Calandra*, 414 U.S. 338 (1974); *Harris v. New York*, 401 U.S. 222 (1971); *Walder v. United States*, 347 U.S. 62 (1954). The requirement of 'standing,' *Alderman v. United States*, 394 U.S. 165 (1969), and the doctrine of harmless error, *Chapman v. California*, 386 U.S. 18 (1967) also derive in part from these considerations."

Nor does that rationale run afoul of *Elkins* where the "silver platter" doctrine received its death knell.[6] *Elkins* held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial." *Id.* at 223. A federal warrant was issued in *Elkins;* however, it was directed to the bank where local officials had placed the evidence for safekeeping. The affidavit in support of the federal warrant was founded upon the advice and information received on a "silver platter" from state officers after their illegal seizure. The Government never claimed that the evidentiary use of the tape recordings in question was justified under the force of the federal warrant, but only that such use was justified by the "silver platter" doctrine. The opinion in *Elkins* is silent as to the validity or invalidity of the federal warrant and only holds that federal officers in such a situation fall into the shoes of the errant state officers and are subjected to the exclusionary rule. The issue of the purity and viability of an independent federal investigation and gathering of a factual basis of probable cause for the issuance of a warrant was not presented in *Elkins* as indeed there were none.

Here the Government makes no claim of lawful evidentiary use of the evidence seized via the outdated "silver

[6]The "silver platter" doctrine, a phrase conceived by Justice Frankfurter in *Lustig v. United States,* 338 U.S. 74 (1949), referred to the procedure whereby evidence illegally seized by state officers could be admitted in federal court so long as federal officers did not participate in the illegal seizure. If the state officers illegally seized evidence and handed it over to the federal officers on a "silver platter," it was admissible.

platter" doctrine, but on the contrary, it claims lawful usage of the evidence seized through the force of a valid federal search warrant and seizure based on knowledge from untainted evidence independently gathered and unrelated to the illegal state warrant and seizure thereunder.[7]

The Government's failure to inform the United States Magistrate in its affidavit for the federal search warrant that the evidence sought under the federal warrant had been previously suppressed by the state court is not a basis for invalidating the federal warrant.[8] The state warrants were held unlawful because they were general warrants, "on their face constitutionally overbroad as to the description of the property to be seized." That infirmity did not go to a lack of factual establishment of probable cause so, here, a lack of advice about the overbroad state warrants was not material to the Magistrate's finding of probable cause. *See generally United States v. Hole,* 564 F.2d 298 (9th Cir. 1977); *United States v. Taxe,* 540 F.2d 961 (9th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977); *United States v. Damitz,* 495 F.2d 50 (9th Cir. 1974).

[7]An examination of the record in *Elkins* at the District Court level discloses that while the state officers held possession of the evidence, consisting of reels of wiretap recordings, they invited the federal officers to listen to them. The federal officers did so. Thereafter the state officers placed the tapes in a safe deposit box for safekeeping. In *Elkins,* unlike here, the state court had not ordered a return of the wiretap evidence to any person. In fact, neither Elkins nor codefendant Clark made any claim to the reels of wiretap recordings.

[8]Romero and Forster's reliance on *Younger v. Harris,* 401 U.S. 37 (1971), and their contention that federal prosecution is barred by collateral estoppel are meritless.

II. Speedy Trial Rights.

Forster next raises various contentions relating to delay prior to his federal indictment. As explained in *Arnold v. McCarthy,* 566 F.2d 1377, 1381-82 (9th Cir. 1978):

> "[There are] two separate safeguards against delay in the different stages of the investigation and prosecution of a crime. In the pre-indictment or pre-arrest stage delay is tested by the general proscriptions of due process. . . . Pre-indictment delay is permissible unless it violates 'fundamental conceptions of justice which lie at the base of our civil and political institutions.' *Rochin v. California,* 342 U.S. 165, 173 . . . (1952). [Citations omitted].
>
> "But once a person becomes 'accused' the more stringent requirements of the Sixth Amendment speedy trial right apply. One becomes 'accused' when there is 'either a *formal indictment or information* or else *the actual restraints* imposed by arrest *and holding to answer a criminal charge . . . .' United States v. Marion,* 404 U.S. 307, 320 . . . (1971). (Emphasis added). At this stage, although standards are still imprecise, the courts have been more willing to find delay to be constitutionally impermissible."

Forster contends that the date of his state arrest should be deemed the initiation of federal prosecution because "a federal prosecution could have taken place as early as the state prosecution." As we held in *United States v. Cordova,* 537 F.2d 1073 (9th Cir.), *cert. denied,* 429 U.S. 960 (1976), the "speedy trial right under the Sixth Amendment [is] not activated until the date of *federal* 'accusation.'" (Emphasis added). *Id.* at 1075.

In *United States v. Marion,* 404 U.S. 307 (1971), the Supreme Court, in dealing with a period of three years between the occurrence of the alleged criminal acts and the filing of the indictment, held that the defendants became "accused" and that the Sixth Amendment protection attached upon the return of a federal indictment. But the Court also ruled that "[i]nvocation of the speedy trial provision . . . need not await indictment, information, or other formal charge." *Id.* at 321. Forster relies on, *inter alia, United States v. DeTienne,* 468 F.2d 151 (7th Cir. 1972), *cert. denied,* 410 U.S. 911 (1973), where the Court stated that "[o]f course, if the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest and the different accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses." *Id.* at 155. Such a situation was not present in *DeTienne* nor is it to be found here. We agree with the District Court's conclusion that "the federal prosecution of defendants was initiated only at the time defendants were indicted on federal charges."

Lastly, we see no evidence indicating that Forster was prejudiced in his ability to conduct his defense. The District Court recognized the appellants had suffered financially during the state and federal proceedings, but found that "there is no basis upon which to conclude that defendants have been denied a fair trial." We agree.

III. Grand Jury Proceedings.

Romero and Forster lastly argue that the grand jury process was abused. They contend that the evidence submitted before the grand jury was insufficient to establish probable cause. Addressing a similar contention in *United States v. Basurto,* 497 F.2d 781, 785 (9th Cir. 1974), we held that:

> "It is clear, however, that when a duly constituted grand jury returns an indictment valid on its face, no independent inquiry may be made to determine the kind of evidence considered by the grand jury in making its decision. *Costello v. United States,* 350 U.S. 359 . . . (1956). To do so would further invade the independence of the grand jury." *See also United States v. Fried,* No. 77-3403 (9th Cir. May 12, 1978) at 1546-47.

We agree with the District Court's statement that "[a]lthough a complete absence of evidence might serve to invalidate an indictment, see *Costello v. United States, supra* at 364 (Burton, J. concurring) and *United States v. Tane,* 329 F.2d 848, 853-54 (2d Cir. 1964), we do not find a complete absence of competent evidence here." Further, it is well established that a grand jury may return an indictment based solely upon hearsay evidence. *Costello.*

Secondly, Romero and Forster complain of the prosecution's failure to provide the grand jury with a letter from Forster's counsel allegedly containing exculpatory evidence. Contrary to the obligation imposed upon the prosecution at trial, the Government is not required to present all evidence that might be exculpatory to a grand jury. *See Loraine v. United States,* 396 F.2d 335, 339 (9th Cir.),

cert. denied, 393 U.S. 933 (1968); *United States v. Chanen,* 549 F.2d 1306 (9th Cir. 1977). Regarding the content of the letter, the District Court ruled that "[t]he evidence sought to be presented did not clearly negate guilt or undermine the authority of the grand jury to act, see *United States v. Mandel,* 415 F. Supp. 1033, 1041-42 (D. Md. 1976)." We agree.

The separate judgments of conviction and sentences to custody entered by the District Court on August 10, 1977 are each affirmed.

AFFIRMED.

MERRILL, Circuit Judge, dissenting:

I dissent from the judgment and from part I of the opinion. I concur with parts II and III. Even as to part I, I agree with much of Judge East's discussion. I have no quarrel with the ruling that the federal search warrants were founded on information obtained from sources independent of any tainted examination of the materials improperly seized by the state. I do not question the federal seizures from Romero's home or Forster's business office of documents theretofore returned by the state. I do not contend that the invalidity of the seizure conferred upon the seized materials permanent immunity from seizure. Once suppressed material is back in the hands of the defendants in my view it is once more subject to seizure, assuming that the warrant under which it is seized is free from taint and that the basis for the earlier suppression does not continue to exist. My trouble with part I relates only to the search of the office of the state prosecutor and the seizure of materials found there.

I review the facts briefly. State officers seized documents from the defendant's premises under a defective warrant. The seized evidence was suppressed by court order. The United States then secured a warrant (avoiding the state defects) to search the quarters of the state prosecutor where the suppressed evidence was to be found. The state prosecutor refrained from returning the evidence until federal seizure had been accomplished. In my judgment the order of suppression, carrying with it a duty on the part of the state to return the seized documents, rendered those documents immune from federal seizure so long as they remained in the hands of the state officials.

To me this result is compelled by *Elkins v. United States*, 364 U.S. 206 (1960). I am unable to distinguish that case as Judge East has done on the ground that the federal warrant there was not free from taint as were the warrants here. The Supreme Court placed no reliance on that fact. However, accepting arguendo that the rationale of *Elkins* would permit a distinction on that ground, I still adhere to my view that suppressed materials are immune from federal seizure while they remain in the hands of the state.

I find it repugnant to principles of federalism to allow the United States willy-nilly to search state offices and seize from state officials materials held by them as evidence in a state prosecution. Such sharing of evidence certainly should be tolerated only when it comes with the state's consent and willing co-operation. When the state, under a suppression order, is under a duty to return the evidence it is in no position to consent to such a sharing. Permitting seizure under these circumstances serves to frustrate the state in carrying out its high purpose and the United States

should not be a party to such frustration. This was made clear in *Elkins*, where the Court stated:

> "[W]hen a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution."

364 U.S. at 221.

The fact that some state officers may be willing to co-operate with federal officials in frustrating the state purpose (as apparently was the case here) cannot affect the result. Where suppression is ordered the state duty is clear and a knowing disregard of that duty by state officers does not serve to wipe it out or justify a federal disregard of it.

I would reverse.

APPENDIX B

In the United States Court of Appeals
For the Ninth Circuit

No. 77-2969

United States of America,
Plaintiff-Appellee,
vs.
Hugo Frederic Forster,
Defendant-Appellant.

[Filed November 3, 1978]

ORDER

Before: MERRILL and SNEED, Circuit Judges,
and EAST, District Judge

In the above case Judges Sneed and East have voted to deny the petition for rehearing and have recommended rejection of the suggestion for a rehearing in banc. Judge Merrill would grant rehearing and recommended rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

The petition for stay of mandate is denied.